dent company's prior equity to the applicant company's subsequent equity. There is no doubt that had the respondent company obtained an easement by deed under the Conveyancing and Law of Property Ordinance, 1886, or registered an easement under the Code or, at least, registered a caveat prior to July 30, 1980 the applicant company would not have entered into the contract of sale and purchase (bearing in mind that the right of way concerned passes through the applicant company's plot) and so would not have acted to its prejudice (see the concluding words of Lord Wright in *Abigail* v. *Lapin* quoted above).

On the other hand, it is true that the applicant company did not register a caveat in respect of its interest as purchaser under the sale and purchaser agreement although in law this would appear to have been possible (see *Chin Cheng Hong* v. *Hameed & Ors.*[12]).

In my view, however, this omission was irrelevant for it could not possibly have caused the respondent company to act to its prejudice. Indeed, there was not, and could not, even have been an allegation to this effect since the rights which accrued to the applicant company were subsequent in point of time to those of the respondent company.

There is a remaining point which needs to be made. According to the affidavit evidence of Tan Keat Hooi, a civil engineer in the employ of Low Yat Holdings Sendirian Berhad, the Caveatee in these proceedings, earthworks on the Mount Pleasure Project on the servient land within which was comprised the applicant company's plot, commenced in March 1979 and were completed about April 1980. The project included the construction of a number of town houses, including the one on the applicant company's plot, which were completed in December 1982. In these circumstances, when the respondent company imposed its caveat on May 31, 1983 it must have had prior knowledge of the applicant company's contending equity. That being so, I would, with respect, echo and adopt the following passage in the judgment of Briggs, J. in *Haroon bin Guriaman* v. *Nik Mah binte Nik Mat & Anor.*[13].

"I think the correct method of approach as regards that is to say that while the failure to impose a caveat may be negligence and, in this respect, both parties were originally equally guilty, the imposition of a caveat when the person imposing it has already knowledge of the contending equity will not necessarily improve his position."

In the result, after taking into consideration the interests of the parties and all relevant discretionary factors, including the balance of convenience, I make an order for removal of the caveat in terms of the summons. The applicant must also have the costs of these proceedings.

Order accordingly.

Solicitors: *Lim Kean Siew & Co.; Gan Teik Chee & Ho.*

HASSAN BIN MOHAMAD & ANOR. v. TEOH KIM SENG

[O.C.J. (Lim Beng Choon J.) July 7, 1986]

[Alor Setar – Kedah Civil Suit No. 151 of 1983]

Damages – Fatal accident – Assessment of damages – Civil Law Act, 1956, ss. 7 & 8.

Tort – Negligence – Liability admitted – Damages.

In this case the plaintiffs sought to recover damages for the death of their son, Mohammed Nazri, a boy of 12 years of age who was killed in a road accident on November 28, 1981. The cause of the accident was the negligent driving of a motor lorry by the defendant. Liability was admitted. The plaintiffs claimed for loss of benefits under section 7 of the Civil Law Act, 1956 ("the Act") and also under section 8 of the Act as administrator and co-administratrix of the estate of the deceased.

Held: (1) although the deceased helped his father in the running of the father's business the so-called services rendered by the deceased to both plaintiffs were not reducible to money value. The plaintiffs also failed to prove that they had a reasonable expectation of pecuniary benefit if the deceased had lived. Therefore, the claims under section 7 of the Act failed;

(2) the award for loss of expectation of life is $4,000;

(3) the award for loss of earnings during the lost years under section 8(2) (c) is $14,954.65.

Cases referred to:

(1) *Blake* v. *Midland Ry* (1852) 18 Q.B. 93; 118 E.R. 35.
(2) *Taff Vale Ry* v. *Jenkins* [1913] A.C. 1, 4.
(3) *Davies* v. *Powell Duffryn Collieries* [1942] A.C. 601, 617.
(4) *Lee Sai Cheong* v. *Wan Lim Cheong* [1962] M.L.J. 259.
(5) *Barnett* v. *Cohen* [1921] 2 K.B. 461.
(6) *Thangavelu* v. *Chia Kok Bin* [1981] 2 M.L.J. 277.
(7) *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136.
(8) *Gammell* v. *Wilson* [1981] 1 All E.R. 578.

CIVIL SUIT.

Brijnandan Singh for the plaintiffs.
Sri Ram for the defendant.

Cur. Adv. Vult.

Lim Beng Choon J. : This action was brought by the plaintiffs to recover damages for the death of their son, Mohd. Nazri bin Hassan, a boy of 12 years of age ("the deceased"), who was killed in a road accident on November 28, 1981 at Jalan Pegawai, Alor Setar Kedah. The cause of the accident was the negligent driving of a motor lorry driven by the defendant. Liability has been admitted and special damages agreed at $1,500. The only issues for decision at the trial were the amounts recoverable by the plaintiffs under the various heads of general damages.

Before I proceed to deal with the matter it is relevant at the outset to mention that the parties through their respective counsel have conceded, quite rightly in my view, that the Civil Law (Amendment) Act 1984 (Act 602) which introduced certain amendments to the Civil Law Act 1956 ("the Act") particularly the amendments to sections 7 and 8 of the Act would not apply to the claims in this action; hence the claims would have to be decided pursuant to the provisions of the said sections 7 and 8 as they stood prior to the 1984 amendments. To avoid tautology the provisions of sections 7 and 8 of the Act hereinafter referred to in this judgment are to be construed as they stood prior to the 1984 amendments.

I shall first touch on the facts of this case. There is no dispute that at the time of the unfortunate accident the deceased was 12 years of age and the first plaintiff, the mother, was 39 years old. There is also no dispute that before his death the deceased was a student in the Sekolah Kebangsaan Sungei Korok, Alor Setar and he was then in the Standard Six class. There is also no doubt that he did render some kind of assistance to the first plaintiff in his business of selling fish at his unlicenced stall outside the Central Market in Alor Setar but he did so only during the weekend school holidays namely every Friday and Saturday of each week. In his evidence the first plaintiff said that he paid the deceased a sum of $4.00 per day for his assistance and that would work out to $32.00 per month. He also said in his evidence that if not for the deceased's assistance he would have to employ another person to help him out on Fridays and Saturdays when his business was quite brisk and for which he would have to pay that other person $8.00 per day which from a simple arithmetical calculation would amount to $64.00 per month. As to the remaining days of the week the first plaintiff frankly admitted that he could manage the business without any extra help since the business in those days was quite sluggish. He also said that compared with his other children, the deceased was better in his studies and his ambition was to become a doctor. When he was cross-examined by counsel for the defendant he said without hesitation that the deceased helped him in his business because the deceased could not bear to see him "doing the work alone and he liked to help." He further agreed that the assistance of the deceased was rendered gratuitously because of the father and son relationship. He too frankly admitted that whether the deceased helped him or not he would have to give almost a similar sum of $32.00 per month to the deceased for his daily expenses as he was responsible for the support of the deceased and that the assistance rendered was not crucial to his business. His other children also helped him in his business and household chores. His net income from the business was about $600.00 per month out of which he had to pay $60.00 per month as rental for his house, and the remaining money went to his household expenses and his children's schooling, including the sum of $32.00 per month for the deceased. The second plaintiff in her evidence merely said that she was aware that her husband paid the deceased $4.00 to $5.00 per day for his helping out with her husband's business during the normal weekly school holidays. Furthermore the deceased also helped out with the household chores by looking after the younger children of the family and washing his own school uniforms. She also said the deceased was good in his studies. In cross-examination she too frankly admitted that her other children also helped out with the household chores. The third witness for the plaintiffs, a vegetable seller in the Central Market, Alor Setar, in his evidence confirmed that the deceased assisted the first plaintiff in his business of selling fish not only during the normal school weekly holidays but also during public holidays and the end of term school holidays.

From the pleadings of the plaintiffs in this action and the submission of their respective counsel, it is clear that the plaintiffs brought this action firstly to claim for the loss of benefits under section 7 of the Act and secondly as administrator and co-administratrix of the estate of the deceased, they also made a claim under section 8 of the Act.

For the purpose of determining the amount of damages, it may be expedient to marshall the two claims under the following heads:

(1) loss of the benefit to the plaintiffs under section 7 of the Act

(2) loss of expectation of life under section 8 of the Act and

(3) loss of future earnings under section 8(2) (c) of the Act for the years of the deceased's natural life which had been curtailed by his premature death.

Claim for loss of benefit under section 7 of the Act

Sub-section (2) of section 7 of the Act which is in pari materia with section 2 of the English Fatal Accidents Act of 1846 provides that the right in respect of the death of the deceased

"shall be for the benefit of the wife, husband, parent and child"

of the deceased. Under sub-section (3) of section 7 of the Act, it is provided that in every such action the Court

"may give such damages as it thinks fit proportioned to the loss resulting from the death to the parties respectively for whom and for whose benefit the action is brought."

Again this sub-section is substantially the same as section 2 of the English Fatal Accidents Act 1846. It will therefore be useful for me to examine the English authorities regarding the interpretation of the scope of section 2 of the English Act of 1846. A review of the English authorities clearly shows that firstly there must be a pecuniary loss to the person for whose benefit the action is brought before he has a cause of action. This principle was established more than a century ago in *Blake* v. *Midland Ry*[1] where it was held that the mental suffering of a wife for the loss of her husband could not be considered in computing the damages. It is interesting to note that just four years after the enacting of the Fatal Accidents Act of 1846 a judicial limitation was placed by the English Court upon the damages to be awarded under section 2 of that Act by restricting them to pure pecuniary losses. The two most authoritative statements of this principle however emanated from the House of Lords some years later. Viscount Haldane L.C. in *Taff Vale Ry* v. *Jenkins*[2] said:

"The basis is not what has been called solatium, that is to say damages given for injured feelings or on the ground of sentiment but damages based on compensation for a pecuniary loss."

More graphic is Lord Wright's statement in *Davies* v. *Powell Duffryn Collieries*[3] where he said:

"There is no question here of what may be called sentimental damages, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence."

Secondly, the pecuniary loss recoverable is limited to the loss of a benefit in money or *money's worth* which if the deceased had survived would have accrued to a person within the defined relationship to the deceased. The following statement of Lord Wright's judgment in the *Davies'* case (*supra*) appropriately illustrated this principle:

"The damages are to be based on the *reasonable expectation of pecuniary benefit or benefit reducible to money value.*" (Emphasis is mine)

From these authorities it is clear that damages recoverable under section 2 of the Fatal Accidents Act 1846 include the monetary loss incurred by replacing services rendered gratuitously by the deceased at the time of his death or where there was a reasonable prospect of their being rendered freely in the future but for the death. Actual monetary loss suffered by the plaintiffs in the instant case due to their being deprived of the services of the deceased which could be reducible to money value would found a valid claim under section 7 of the Act. Likewise prospective loss would also found a valid claim provided that the parents in the instant case could establish that they had a reasonable expectation of pecuniary benefit if the deceased had lived – see Lord Atkinson's speech at page 7 in *Taff Vale Ry's* case (*supra*).

Applying the above principles to the instant case, there is no doubt that the deceased did render some assistance to the first plaintiff in his business of selling fish. The assistance was given only during the normal weekly school holidays and it was given gratuitously. The first plaintiff could at any rate carry on the business by himself without the assistance rendered by the deceased. If the first plaintiff had had employed another person at $8.00 per day to do the work done by the deceased, then the argument that the first plaintiff had suffered pecuniary loss would be tenable. But that was not what happened. He was able to carry out his business even without the assistance given by the deceased. In fact the assistance was redundant so to speak. The more important thing to note is that the sum of $32.00 per month given by the first plaintiff to the deceased was not for the

assistance rendered by him but for his pocket expenses as admitted by the first plaintiff under cross-examination.

Another equally important thing to note is that the first plaintiff also admitted that his other children also helped him with his business of selling fish. Likewise the evidence of the second plaintiff also shows that the so-called services rendered by the deceased in carrying the household chores was nothing more than that he undertook to wash his own school uniforms and to look after the younger children. She also admitted that her other children did also help her out with the household chores.

In the circumstances I am satisfied that the so-called services rendered by the deceased to both the plaintiffs are not reducible to money value and the claims of both the plaintiffs under section 7 of the Act cannot be entertained. I find support for my decision from the judgment of Thomson J. in *Lee Sai Cheong* v. *Wan Lim Cheong*[4] which was unanimously agreed by the other two judges of the Court of Appeal. The facts in that case were on all fours with the facts in the instant case. There the plaintiff brought an action claiming *inter alia* damages under section 7 of the Civil Law Ordinance. The plaintiff's son, a young man of 19 years of age, was killed in a traffic accident. The plaintiff contended that his deceased son used to help him in his business as a building contractor. The help rendered by the deceased son was to keep stock of the plaintiff's building material and for the help he paid his deceased son "$200.00 per month". The plaintiff also claimed that if he had to employ another person to carry out the work done by the deceased he would have to pay that other person $400.00 per month. In upholding that the trial judge was right in rejecting the plaintiff's claim for damages under section 7 of the said Ordinance, Thomson J. said:

"With respect, I entirely agree with this conclusion. After all if the father had had to employ a man at $400.00 a month to do what the deceased had been doing for $200.00, then the argument that he had suffered loss would have been tenable. But that was not what happened. What happened was that he was able to get along without anybody doing the work and presumably he did it himself or it was not done. In neither case can he claim to have suffered any pecuniary loss."

As to the prospective loss, I am also satisfied that in the circumstances of the instant case both the plaintiffs had failed to prove on the balance of probabilities, that they had a reasonable expectation of pecuniary benefit if the deceased had lived. The deceased was 12 years of age at the time of his death. The first plaintiff had 12 children and 3 of the children were older than the deceased. Any of these children could have helped him in his business. At the date of the trial the first plaintiff said he was 53 years old and the second plaintiff 44 years of age. Apparently the first plaintiff was still carrying on his business without suffering any losses despite the death of the deceased. Should both plaintiffs reach an age when they could no longer carry on their work no doubt their other children could take over the business and look after the household chores. In any event it would be pure speculation to say that the deceased would be in a position to support them in the future or take over the first plaintiff's business. The deceased's education and upkeep would have been a substantial burden to the plaintiffs for many years if he had lived. On the facts of the instant case I am satisfied that the plaintiffs have not proved damages either actual or prospective. Their claim, to use the words of McCardie J. in *Barnett* v. *Cohen*[5] "is pressed to extinction by the weight of multiplied contingencies." I therefore hold that their action under section 7 of the Act cannot be sustained.

Loss of expectation of life

The conventional amount awarded for the loss of expectation of life is $4,000/- as awarded by the Federal Court in the Federal Court Civil Appeal 172/78 referred to in *Thangavelu* v. *Chia Kok Bin.*[6] As I am bound by the decision of the Federal Court I accordingly award the plaintiffs a similar award.

Loss of future earnings under section 8(2)

The claims of the plaintiffs as administrator and co-administratrix of the estate of the deceased is made under section 8(2) (c) of the Act which again is *in pari materia* with section 1(2)(c) of the English Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act") which reads:

"Where a cause of action survives...for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person.

(a) ..... (not applicable here)

(b) ..... (not applicable here)

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses may be included."

In view of the fact that section 8(2) (c) of the Act was an exact replica of section 1(2) (c) of the 1934 Act, an examination of the English authorities would be useful.

At one time there were some doubts amongst the English judges as to the correct interpretation of the section 1(2) (c) of the 1934 Act. Those doubts were laid to rest by the House of Lords in *Pickett* v. *British Rail Engineering Ltd.*[7] There it was held that the true rule of law in the interpretation of section 1(2) (c) of the 1934 Act was that a deceased's loss of future earnings (and future expectations) in the years of his natural life which had been curtailed by his premature death (commonly known as the 'lost years') was recoverable under the 1934 Act "where the facts were such that the loss was not too remote to be measurable" (Lord Scarman's speech at page 171A). In the *Pickett* case (*supra*) I do take note of the fact that the claim for compensation under the loss of earnings during the lost years was for the benefit of the estate of a deceased who had a set pattern of life and a settled income with every prospect of continuing to earn a good living. Nevertheless from my reading of the five judgments in that case, I cannot detect any suggestion prohibiting the recovery of damages under the head of loss of future earnings for the benefits of an estate of an adolescent who was at the time of death old enough to start to earn. All that was said in the judgments in the *Pickett* case (*supra*) is that in the case of "adolescents just embarking upon the process of earning the value of 'lost' earnings might be real but could probably be assessable as small" (see the speech of Lord Wilberforce at page 150E). Lord Salmon was equally cautious about the measure of damages that could be awarded under the head of damages for the benefit of an estate of a young person. Thus he said at page 153G:

"At one end of the scale the claim may be made on behalf of a young child or his estate. In such a case, the loss of earnings are so unpredictable and speculative that only a *minimal* sum could properly be awarded." (Emphasis is mine)

The leading English authority in this aspect of the law is obviously the case of *Gammell* v. *Wilson*.[8] Faced with the difficulty in surmounting the rule laid down in the *Pickett* case (*supra*) counsel for the respective appellants in the *Gammell* case (*supra*) developed their submissions in an ingenious way by contending that a claim under section 1(2) (c) of the 1934 Act could not be sustained as the loss of future earnings in the lost years of the deceased would be a loss to the estate as a consequence of his death and likewise a compensation of such loss of future earnings would amount to a 'gain' to his estate as a consequence of his death. Such 'loss' or 'gain' as a consequence of the death of the deceased should be ignored since paragraph (c) of section 1(2) of the 1934 Act said that in calculating the damages recoverable under that paragraph "any loss or gain to his (the deceased's) estate consequent on his death" should not be taken into account.

In rejecting the appeal the opinions of the House of Lords that can be distilled from their judgments seem to me to be as follows:

(a) the policy of section 1(2) (c) of the 1934 Act was to abolish the vigour of the maxim of *actio personalis moritur cum persona*. That section therefore created no cause of action which had already existed prior to the death of the deceased but merely provided for the survival of an existing cause of action – see the speech of Lord Russell of Killowen at page 589f and that of Lord Scarman at page 592c.

(b) on the true construction of paragraph (c) of that section, damages for curtailing a man's working life should not be regarded as consequent on the death of the deceased but consequent on the tortious act which caused the death and should not therefore be precluded by section 1(2)(c) of the 1934 Act (see speech of Lord Edmund-Davies at page 586g, the speech of Lord Russell of Killowen at page 590a-f and that of Lord Scarman at page 592 to page 593b.

(c) on the principle that damages for loss of earnings in the lost years should be fair compensation for the loss suffered by the deceased in his lifetime; there was no room for conventional award. The loss was pecuniary and as such there must be some evidence to show that the deceased was actually earning or there was *some real prospect* of an ability and opportunity to earn. Where there was such evidence the damage could be assessable to support the claim. (See the speech of Lord Scarman at page 593d).

(d) in assessing the measure of damages of the loss of earnings in the lost years there should be deducted from the total earnings the amount that the deceased would have spent out of those earnings on his own living expenses and pleasures.

Applying the above opinions of the House of Lords in the *Gammell* case (*supra*) to the case before me there is no doubt that the deceased, at the time of his death had almost reached 'adolescent' age. There is also no doubt that he had *some real prospect* of an ability and opportunity to earn. From the evidence I am satisfied that he was a good and bright son. Both the plaintiffs spoke highly of him. If the necessity had arisen there is no doubt on the evidence that he would at the very least be employed by someone in the business of selling fish. The deceased therefore had a cause of action to claim for the damages for the loss of earnings during the lost years which survived for the benefit of his estate and the plaintiffs as administrator and co-administratrix respectively of his estate could bring this action to claim such loss of earnings for the benefit of his estate.

Bearing in mind that the deceased was not actually earning immediately prior to his death but he had only a real prospect of the ability and opportunity to earn, I must assess his earning on what I can gather from the facts to be his minimum monthly earning had he lived. In this respect I think a sum of $180.00 per month would be a fair figure. For his personal expenses I would take off $80.00 per month leaving a sum total of $100.00 as his monthly saving. In considering the multiplier for the lost years I have to take into account the ordinary risks of life and I think a multiplier of 20 for the lost years is a reasonable and fair figure. The measure of damages in accordance with the actuarial table is therefore $14,954.65.

I accordingly give judgment in favour of the plaintiffs as follows:

Special damages as agreed	$ 1,500.00
Damages for loss of expectation of life	$ 4,000.00
Damages for loss of earnings in the lost years under section 8(2)(c)	$14,954.65
Total	$20,454.65

The sum of $1,500.00 as special damages will carry an interest of 3% per annum from the date of the accident to the date of the trial. The damages for loss of expectation of life will also carry an interest of 6% per annum from the date of the service of the writ to the date of the trial. There will be no interest in respect of the damages for the loss of earnings during the lost years.

There will be an order of costs in favour of the plaintiffs.

Order accordingly.

Solicitors: *Brijnandan Singh & Co.; Sri Ram, Zulkifli & Kumar.*

PUBLIC PROSECUTOR v. WONG AH NGAN

[O.C.J. (Peh Swee Chin J.) July 21, 1986]

[Ipoh – Perak Criminal Trial No. 11 of 1984]

Dangerous Drugs – Trafficking in heroin - Whether prosecution had made out a case – Defence failed to raise reasonable doubt – Conviction – Mandatory death sentence – Dangerous Drugs Act 1952, s. 39B.

On March 23, 1984, Insp. Mudasir (PW2) with a party of officers raided the premises No. 5–N, 3rd Floor, Taman National, Jalan Gopeng, Ipoh. In one of the rooms, packets containing approximately 20.43 gms. of heroin were found. The accused was also found in the room and was arrested by the officers. At the close of the prosecution case, the learned Defence Counsel submitted that there was no case to answer. However, the learned trial Judge ruled that a *prima facie* case had been made out and called on the accused to enter on his defence. The accused gave evidence that he rented the room for 9 days only and that for 2 out of such 9 days he did not stay there. Moreover he alleged that he did not notice the drugs in question and that they did not belong to him.

Held: the defence had not raised a reasonable doubt which entitled the accused to be acquitted. The accused is guilty and is convicted and sentenced to death.

CRIMINAL TRIAL.

Sarala Pillai (Miss) (Deputy Public Prosecutor) for the *Public Prosecutor.*

Chin Yoong Fee for the accused.

Cur. Adv. Vult.

Peh Swee Chin J.: This case is yet another case of drug trafficking under section 39B of the Dangerous Drugs Act 1952 which culminated in a conviction for which I had to pass the mandatory sentence of death by hanging. I now give my grounds of judgment. First I will set out the material parts of the evidence.

On March 23, 1984, Insp. Mudasir (PW2) received instructions to raid premises No. 5-N, 3rd Floor, Taman National, Jalan Gopeng, Ipoh. He